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TAN SRI DR MUHAMMAD SHAFEE ABDULLAH v. TOMMY THOMAS & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD SHAHRIR MOHD SALLEH J
[CIVIL SUIT NO: 22NCVC-127-03-2015]
22 JULY 2025

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Abstract – *Section 99(1) of the Legal Profession Act 1976 serves, in part, to safeguard legal practitioners from unwarranted reputational harm. Where a statute is enacted for the protection of a particular class of persons and a breach of that statute causes the very harm it was intended to prevent, the injured party ought to be entitled to seek compensation under the tort of breach of statutory duty, especially when the advocate and solicitor 'had been damnified' and suffered prejudice. In assessing quantum of damages, courts must apply the principles of moderation and proportionality, which extends to all reputational harms, including those resulting from breaches of statutory duty that affects an advocate's professional standing.*

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LEGAL PROFESSION: *Malaysian Bar – Statutory duty – Breach – Assessment of damages – Bar Council circulated motion against advocate and solicitor to members in advance of Annual General Meeting – Whether action contravened requirements under s. 99(1) of Legal Profession Act 1976 ('LPA') – Whether statutory immunity conferred by s. 111 of LPA available to Bar – Whether advocate and solicitor 'had been damnified' – Whether there was loss of reputation and injury to feelings – Whether there was proof of diminished professional opportunities – Whether award for emotional distress justified as recognition of psychological impact flowing from breach – Disregard for procedural safeguards intended to protect rights of advocates and solicitors – Whether award for general damages, aggravated damages and exemplary or punitive damages warranted*

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TORT: *Breach of statutory duty – Malaysian Bar – Bar Council circulated motion against advocate and solicitor to members in advance of Annual General Meeting – Whether action contravened requirements under s. 99(1) of Legal Profession Act 1976 ('LPA') – Assessment of damages – Whether statutory immunity conferred by s. 111 of LPA available to Bar – Whether advocate and solicitor 'had been damnified' – Whether there was loss of reputation and injury to feelings – Whether there was proof of diminished professional opportunities – Whether award for emotional distress justified as recognition of psychological impact flowing from breach – Disregard for procedural safeguards intended to protect rights of advocates and solicitors – Whether award for general damages, aggravated damages and exemplary or punitive damages warranted*

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TORT: *Damages – Assessment of – Breach of statutory duty – Malaysian Bar – Bar Council circulated motion against advocate and solicitor to members in advance of Annual General Meeting – Whether action contravened requirements under s. 99(1) of Legal Profession Act 1976 ('LPA') – Whether statutory immunity conferred by s. 111 of LPA available to Bar – Whether advocate and solicitor 'had been damnified' – Whether there was loss of reputation and injury to feelings – Whether there was proof of diminished professional opportunities – Whether award for emotional distress justified as recognition of psychological impact flowing from breach – Disregard for procedural safeguards intended to protect rights of advocates and solicitors – Whether award for general damages, aggravated damages and exemplary or punitive damages warranted*

This was the assessment of damages following a finding by the Federal Court of a breach of statutory duty by the Malaysian Bar ('third defendant'), which arose under s. 99(1) of the Legal Profession Act 1976 ('LPA'). The present dispute arose from a motion titled 'Motion Against Shafee Abdullah' stemming from the plaintiff's conduct in his role as an *ad hoc* Deputy Public Prosecutor in the case of *PP v. Anwar Ibrahim*. The Bar Council had circulated the said motion to its members in advance of the 69th Annual General Meeting ('AGM') scheduled to be held on 14 March 2015. A day before the AGM, the plaintiff instituted a civil suit and successfully obtained an *ex parte* injunction, restraining the Malaysian Bar from tabling or discussing the motion at the forthcoming AGM. At the High Court, the plaintiff pursued his claim based on three distinct causes of action (i) defamation; (ii) conspiracy to defame; and (iii) breach of statutory duty. The High Court dismissed all three claims advanced by the plaintiff, and the Court of Appeal affirmed the decision of the High Court. The plaintiff then sought leave to appeal to the Federal Court. The Federal Court allowed the plaintiff's appeal on the issue of breach of statutory duty and held that (i) the motion constituted a complaint which ought to have been referred directly to the Disciplinary Board under s. 99(1) of the LPA; and (ii) the motion should not have been circulated to members of the Bar nor tabled for resolution at the AGM. The Federal Court further held that the Malaysian Bar had acted in breach of s. 99(1) of the LPA and that as a result, 'the appellant had been damnified'. The Federal Court remitted the matter to the High Court for the purpose of assessing damages to be awarded against the Malaysian Bar. The plaintiff claimed damages in light of the said breach, seeking a global sum of RM2 million, claimed under the heads of general damages, aggravated damages and exemplary or punitive damages.

Held (ordering accordingly):

(1a) For statutory immunity under s. 111 of the LPA to be invoked successfully, the third defendant must establish two essential elements. First, the act in question must have been done under the Act, that is pursuant to and in compliance with the provisions of the LPA. Second,

A the act must not have been done in bad faith or with malice. The Federal Court had made a conclusive finding that the third defendant acted in breach of s. 99(1) of the LPA. Specifically, the third defendant published a motion entitled 'Motion Against Shafee Abdullah' on its website and tabled it for resolution at the AGM, which contravened s. 99(1), which
B required the matter to be referred directly to the Disciplinary Board. Thus, the statutory immunity conferred by s. 111 of the LPA was not available to the third defendant. The act of circulating the motion and tabling it for resolution at the AGM was not an act which could be properly described as one which was 'done under the Act'. On the
C contrary, it was an act done in breach of the Act. The third defendant was therefore not shielded from liability by s. 111 of the LPA. (paras 30-37)

(2) Section 99(1) of the LPA serves, in part, to safeguard legal practitioners from unwarranted reputational harm. Where a statute is enacted for the
D protection of a particular class of persons and a breach of that statute causes the very harm it was intended to prevent, the injured party ought to be entitled to seek compensation under the tort of breach of statutory duty. The plaintiff had been 'damnified' as a consequence of the breach. The allegation of misconduct by the appellant with all its intended
E defamatory meaning had been disseminated to no less than 15,000 members of the Bar, other than being disclosed to the media even before a complaint under s. 99(1) of the LPA was lodged with the Disciplinary Board. Thus, in light of the prejudice suffered by the plaintiff, damages for loss of reputation and injury to feelings were, in principle, recoverable under the tort of breach of statutory duty. (paras 42-44)

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(3) The plaintiff's continued engagement in certain prominent matters when viewed alongside the issues of client concentration and engagement timing did not conclusively disprove the existence of reputational damage or lost opportunity. Taking into account the Federal Court's
G finding that the plaintiff was 'damnified' by the dissemination of allegations to approximately 15,000 members of the Bar and to the media, an award for reputational loss and injury to feelings was warranted. The quantum must be commensurate with the limited evidence of actual damage. The award must reflect a measured and proportionate response to the proven harm. (paras 50 & 51)

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(4) Claims for economic loss are recoverable under the tort of breach of statutory duty where such loss flows from a breach of s. 99(1) of the LPA. The statutory scheme of the LPA is intended to protect the livelihood of an advocate and solicitor and towards that end, a claim in
I damages for economic loss could not be denied. The plaintiff had not furnished specific or corroborate evidence of any particular opportunities lost as a result of the breach. He had not provided any

documentary proof, such as correspondence, briefing records or client withdrawal notices to support his allegation. Nonetheless, some inference may reasonably be drawn from the narrowing composition of the plaintiff's client base following the circulation of the motion. The observable concentration of work from a smaller pool of clients suggested the possibility of diminished professional opportunities. Therefore, a modest award under this head of damage was warranted and proportionate to the available evidence. (paras 55-63)

(5) Order 18 r. 12(1)(b) of the Rules of Court 2012 mandates that matters involving the state of mind, such as emotional distress or psychological injury, must be expressly and specifically pleaded. The plaintiff had produced medical records indicating that he was admitted to the Institut Jantung Negara (IJN) in July 2016 and again in January 2017. While these records confirmed hospitalisation, they did not establish the underlying cause of the plaintiff's medical condition. Moreover, both admissions occurred more than one year after the circulation of the motion on 9 March 2015. The plaintiff had not called any medical expert to testify that the breach of statutory duty was a proximate or contributing cause of the said health issues. No medical report, diagnosis or opinion had been produced linking the breach to the conditions treated during the admissions. A bare assertion of stress or illness unsupported by medical opinion or evidence did not meet the threshold of proof required. In the absence of expert medical evidence to establish causation, the plaintiff's claim for damages in respect of mental stress and health related issues had not been adequately substantiated. Nevertheless, the plaintiff had been 'damnified' as a result of the third defendant's conduct, which implied that some measure of distress was sustained, including emotional distress resulting from the premature and public circulation of serious allegations. Accordingly, a modest award under this head was justified not on the basis of physical health consequences but as recognition of the psychological impact flowing from that breach. (paras 65-71)

(6) The Federal Court did not make a formal finding that the third defendant had acted with malicious intent or improper purpose. Moreover, both the High Court and the Court of Appeal had previously made concurrent findings that the motion was circulated on an occasion of qualified privilege and without malice. These findings were not disturbed by the Federal Court and as such, they remain binding. The existence of qualified privilege coupled with the absence of malice weighed very much against the award of aggravated damages. Nonetheless, the Federal Court's finding that the third defendant knew exactly what the correct procedure was indicated a serious degree of institutional carelessness. While this may not rise to the level of malice, it reflected a knowing disregard for procedural safeguards intended to protect the rights of

advocates and solicitors. Such conduct warranted a limited award of aggravated damages. The award served not as punishment but as compensation for the heightened injury caused by the third defendant's failure to adhere to known statutory obligations in a matter of professional discipline. (paras 78-81)

(7) Exemplary damages, unlike compensatory or aggravated damages, are awarded not to compensate the plaintiff but to punish the defendant and to deter similar future conduct. The foundational authority on the scope of exemplary damages remains *Rookes v. Barnard*. The third defendant, in carrying out its functions under s. 64(6) of the LPA, did not act as a governmental authority or agent. The act of circulating options submitted by members under s. 64(6) of the LPA is not an exercise of governmental power. It was an internal procedural function undertaken within the governance framework of the legal profession. There was also no evidence to suggest that the third defendant sought to derive any financial or strategic benefit by disseminating the motion. The plaintiff had thus failed to establish that the third defendant's conduct fell within any of the established categories set out in *Rookes v Barnard*. There was no basis upon which to award exemplary damages and no award was made under this head of claim. (paras 83-91)

(8) The total global sum awarded was RM340,000, an amount which represented a fair, reasonable and proportionate assessment of the compensatory relief flowing from the third defendant's breach of statutory duty under s. 99(1) of the LPA. (para 99)

Case(s) referred to:

Big Junkyard Sdn Bhd & Anor v. Chan Kah Wai [2023] 1 CLJ 564 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor [2010] 5 CLJ 301 HC ***(refd)***

Harmon CFEM Facades (UK) Ltd v. Corporate Officer Of The House of Commons [1999] All ER (D) 1178 ***(refd)***

Johnson v. Medical Defence Union Ltd [2006] EWHC 321 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Bar Malaysia [2022] 1 CLJ 81 CA ***(refd)***

Khaw Cheng Poon & Ors v. Khaw Cheng Bok & Ors & Another Appeal [2005] 3 CLJ 753 CA ***(refd)***

Kho Poh Teck v. Digi Telecommunications Sdn Bhd [2006] 2 CLJ 957 HC ***(refd)***

Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor [2021] 6 CLJ 157 FC ***(refd)***

Lonrho Plc v. Fayed (No 5) [1993] 1 WLR 1489 ***(refd)***

Malaysian Bar & Anor v. Government Of Malaysia [1987] 1 CLJ 459; [1987] CLJ (Rep) 185 SC ***(refd)***

Masters Home Improvement Pty Ltd v. North East Solution Pty Ltd [2017] 372 ALR 440 ***(refd)***

Maybank Trustees Bhd v. Amtrustee Bhd & Ors And Other Appeals [2019] CLJU 1454; [2019] 1 LNS 1454 CA ***(refd)***

Nurul Izzah Anwar v. Tan Sri Khalid Abu Bakar & Anor [2018] 7 CLJ 622 HC ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
PP v. Mohd Dzahir Ahmad [2015] 4 CLJ 880 CA ***(refd)***
Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors [2018] CLJU 62; [2018] 1 LNS 62 CA ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Sambaga Valli K R Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] CLJU 500; [2017] 1 LNS 500 CA ***(refd)***
Shen & Sons Sdn Bhd v. Jutawarna Development Sdn Bhd & Ors [2015] 8 CLJ 125 HC ***(refd)***
Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals [2021] 9 CLJ 179 FC ***(refd)***
Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2003] 2 CLJ 752 HC ***(refd)***
Uda Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals [2009] 1 CLJ 329 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 126
Legal Profession Act 1976, ss. 64(6), 99(1), 111
Rules of Court 2012, O. 18 r. 12(1)(b)

For the plaintiff - Muhammad Shafee Abdullah & Sarah Abishegam as "McKenzie Friend"; M/s Shafee & Co
For the 3rd defendant - Lambert Rasa-Ratnam, Andrew Chiew Ean Vooi & Colin Yoong Shern Zian; M/s Lee Hishammuddin Allen & Gledhill

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Shahrir Mohd Salleh J:

Introduction

[1] This is the assessment of damages following a finding by the Federal Court of a breach of statutory duty by the Malaysian Bar. The breach arose under s. 99(1) of the Legal Profession Act 1976 ("LPA").

[2] In its judgment, the Federal Court held that the Malaysian Bar had committed a breach of statutory duty. The breach occurred when the Malaysian Bar published a motion entitled "Motion Against Shafee Abdullah" on its official website and subsequently tabled the said motion for deliberation and resolution at the Annual General Meeting ("AGM"). The Federal Court found that such action contravened the requirements of s. 99(1) of the LPA. Under that provision, the Malaysian Bar was obliged to refer the matter directly to the disciplinary board rather than raising it through a public forum such as the AGM.

[3] The plaintiff, Tan Sri Dr Muhammad Shafee Abdullah, claims damages in light of the said breach. He seeks a global sum of RM2 million. This sum is claimed under the heads of general damages, aggravated damages and exemplary or punitive damages.

[4] The general damages claimed encompass several aspects. These include reputational harm, injury to feelings, loss of professional opportunities, loss of earnings and deterioration of mental health due to stress. The plaintiff further claims that the conduct of the Malaysian Bar warrants aggravated and punitive damages in view of its alleged recklessness and disregard for his rights.

[5] The third defendant, namely the Malaysian Bar, refutes the plaintiffs entitlement to damages. In defence, it advances several grounds. Among the primary grounds is a claim of statutory immunity under s. 111 of the LPA. The Malaysian Bar also submits that the plaintiff has failed to establish a causal link between the breach and the loss allegedly suffered. It contends that the plaintiff has not adduced sufficient evidence to prove any actual damage or injury flowing directly from the breach of statutory duty.

[6] The principal issue before this court is whether the plaintiff is entitled to an award of damages pursuant to the breach of statutory duty as previously found by the Federal Court. Should the answer to that question be in the affirmative, this court must further determine the appropriate quantum of damages to be awarded.

Brief Background Of Facts

[7] The present dispute arises from a motion titled "Motion Against Shafee Abdullah" dated 28 February 2015. The motion was proposed by the first defendant, Tommy Thomas, and seconded by the second defendant, Tan Sri Vadaketh Chacko George. The motion sought three specific outcomes. First, it sought to condemn the plaintiff in the strongest terms for his behaviour since 10 February 2015. Second, it urged the incoming Bar Council to lodge a complaint against the plaintiff with the Disciplinary Board. Third, it called upon the Bar Council to take appropriate steps to prevent the plaintiff from bringing the legal profession into disrepute.

[8] The motion stemmed from the plaintiff's conduct in his role as *ad hoc* Deputy Public Prosecutor in the case of *PP v. Anwar Ibrahim*. The motion also referred to certain public comments made by the plaintiff following the Federal Court's decision in that case.

[9] On 9 March 2015, the Bar Council circulated the said motion to its members. This was done in advance of the 69th AGM scheduled to be held on 14 March 2015. A day before the AGM, the plaintiff instituted a civil suit and successfully obtained an *ex parte* injunction. The injunction restrained the Malaysian Bar from tabling or discussing the motion at the forthcoming AGM.

[10] Subsequently, on 26 June 2015, the Bar Council lodged a formal complaint with the disciplinary board against the plaintiff. According to the plaintiff's evidence adduced before this court, the disciplinary proceedings arising from that complaint remain ongoing.

[11] At the High Court, the plaintiff pursued his claim based on three distinct causes of action. These were (i) defamation; (ii) conspiracy to defame; and (iii) breach of statutory duty. Following a full trial, the High Court dismissed all three claims advanced by the plaintiff.

[12] The plaintiff thereafter filed an appeal to the Court of Appeal. The Court of Appeal affirmed the decision of the High Court. The plaintiff's appeal was accordingly dismissed in its entirety.

[13] The plaintiff then sought leave to appeal to the Federal Court. In August 2020, the Federal Court granted leave to appeal but limited the leave to only one issue, namely the claim for breach of statutory duty. Leave to appeal in respect of the other claims was refused.

[14] In October 2021, the Federal Court allowed the plaintiffs appeal on the issue of breach of statutory duty. The Federal Court held that the motion constituted a complaint which ought to have been referred directly to the Disciplinary Board under s. 99(1) of the LPA. The court found that the motion should not have been circulated to members of the Bar nor tabled for resolution at the AGM.

[15] The Federal Court further held that the Malaysian Bar had acted in breach of s. 99(1) of the LPA and that as a result, "the appellant had been damnified". The Federal Court remitted the matter to the High Court for the purpose of assessing damages to be awarded against the Malaysian Bar.

[16] Following the Federal Court's decision, the Malaysian Bar filed an application for review. This application for review was dismissed by the Federal Court.

Analysis And Findings

Scope Of The Federal Court's Decision

[17] The third defendant submits that the Federal Court's decision was limited strictly to the issue of breach of statutory duty. It did not disturb the concurrent findings of the High Court and the Court of Appeal in respect of the claims for defamation and conspiracy to defame.

[18] The third defendant contends that these undisturbed findings remain binding and operative. In particular, the findings relating to the defences of justification, fair comment and qualified privilege are said to be directly relevant to the present assessment of damages. The third defendant argues that such findings are especially material when considering the plaintiff's claim for loss of reputation.

[19] This court is therefore required to examine the precise scope and effect of the Federal Court's decision. It is necessary to ascertain whether the Federal Court intended to alter or displace the findings on defamation and conspiracy to defame.

[20] At para. [80] of its judgment, the concluding remarks of the Federal Court read as follows:

> [80] In the circumstances, the appeal is allowed with no order as to costs. The decision of the Court of Appeal is set aside and the appellant's claim is allowed in terms of the prayers reproduced in para. 8 of this judgment. The case is reverted to the High Court for assessment of damages against the Malaysian Bar (third respondent) by a High Court Judge. We are not making the same order against Tommy Thomas (first respondent) and Tan Sri VC George (second respondent) as unlike the Malaysian Bar, they are not statutory bodies bound by section 99(1) of the LPA.

[21] The principle that a judgment must be construed as a whole is well-established. This principle governs the proper interpretation of judicial decisions and must be applied here. Speaking for the Court of Appeal in *PP v. Mohd Dzahir Ahmad* [2015] 4 CLJ 880; [2015] 4 MLJ 880; [2014] MLRAU 476, His Lordship the Honourable Balia Yusof Wahi JCA (later FCJ) remarked as follows:

> [34] A judgment must be read as a whole and one must refrain from reading any judgment by dissecting it into various parts or paragraphs and examining those parts or paragraphs in isolation. Foremost in our consideration is whether or not in substance the judgment manifests the trial judge's consideration of the evidence and the law in coming to his conclusion ...

[22] At para. [11] of its judgment, the Federal Court expressly stated the scope of the appeal as follows:

> [11] To avoid any misapprehension of the issues involved, we need to mention that this appeal is only concerned with the question whether the respondents are liable in the tort of breach of statutory duty and not for the other two causes of action, namely defamation and conspiracy to defame. Nor is this appeal concerned with the question whether the appellant has or has not been guilty of misconduct.

[23] This clear and unambiguous part of the judgment defines the limit of the Federal Court's consideration. It affirms that the issues of defamation and conspiracy to defame did not fall within the ambit of the appeal and as such were not the subject of any reversal.

[24] Further, at para. [77] of its judgment, the Federal Court reaffirmed the fact that the defence of justification had availed the defendants of the plaintiff's claim for defamation. That part of the judgment read as follows:

> [77] For completeness and before we conclude, we need to touch very briefly on the appellant's claim against the respondents for the tort of defamation which was dismissed by the High Court and affirmed by the Court of Appeal on the grounds that the respondents had succeeded in establishing the defence of justification. What this means is that the defamatory nature of the words were proved by the appellant except that

> the claim could not be sustained as the respondents were protected by the defence of justification. Nothing beyond that must be read into the decision.

[25] This observation makes it clear that the Federal Court did not revisit the factual or legal conclusions made by the High Court and Court of Appeal on the defamation claim.

[26] The Federal Court also reiterated this position in its decision on the review application and further confirms the limited scope of the Federal Court's intervention. It stated:

> As far as our decision is concerned the Federal Court set aside the Court of Appeal decision within the confine of the breach of statutory duty.

[27] In light of the above, this court finds that the Federal Court's decision is confined solely to the issue of breach of statutory duty. The findings of the High Court and the Court of Appeal on the claims for defamation and conspiracy to defame must, therefore, remain undisturbed.

[28] This finding has a material bearing on the assessment of damages. In particular, the established defences of justification, fair comment and qualified privilege, having been upheld in respect of the defamation claim, shall remain relevant when considering whether the plaintiff has suffered reputational loss as a consequence of the breach of statutory duty.

Section 111 Of The LPA – Statutory Immunity

[29] The third defendant contends that it is entitled to statutory immunity under s. 111 of the LPA in respect of the plaintiff's claim for damages.

> Section 111 of the LPA provides as follows:
>
> No action or proceeding shall lie against the Disciplinary Committee, the Disciplinary Board, the Malaysian Bar, the Bar Council or any State Bar Committee or any member thereof for any act or thing done under this Act including any pronouncement or publication of any decision of the disciplinary board unless it is proved to the Court that the act or thing was done in bad faith or with malice.

[30] For the statutory immunity under s. 111 of the LPA to be invoked successfully, the third defendant must establish two essential elements. First, the act in question must have been done under the Act, that is, pursuant to and in compliance with the provisions of the LPA. Second, the act must not have been done in bad faith or with malice. The burden rests on the third defendant to satisfy both elements.

[31] In the case of *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2003] 2 CLJ 752; [2003] 2 MLJ 554; [2003] 3 AMR 423, the High Court agreed that s. 111 of the LPA must be construed narrowly. The court held that the section only confers protection for acts or things done under the LPA.

[32] This interpretation accords with the general purpose of the provision regulating statutory immunity. Such provisions are designed to protect statutory bodies and their members when they act lawfully within the scope of their authority. They do not extend protection where the act in question constitutes a breach of a statutory obligation or falls outside the legal mandate of the statutory body.

[33] In the present case, the Federal Court has made a conclusive finding that the third defendant acted in breach of s. 99(1) of the LPA. Specifically, the third defendant published a motion entitled "Motion Against Shafee Abdullah" on its website and tabled it for resolution at the AGM. The Federal Court held that this act contravened s. 99(1) which required the matter to be referred directly to the disciplinary board.

[34] In light of this finding, the act in question cannot be characterised as one "done under the Act". It was, rather, an act done in direct violation of the express provisions of the LPA.

[35] Moreover, the breach of s. 99(1) by the third defendant was not of a technical or procedural nature. The Federal Court, at para. [35] of its judgment emphasises the gravity of the breach in the following words:

> [35] Quite apart from the wrong procedure adopted by Tommy Thomas and Tan Sri VC George in lodging the complaint of misconduct by the appellant, the Malaysian Bar committed a far more serious breach of the law when it published the motion on its website and tabling it for resolution at the AGM. This is not only illegal but grossly unfair and highly prejudicial to the appellant as it amounts to a prejudgment of his guilt ahead of the disciplinary proceedings before the disciplinary board.

[36] This finding underscores the substantive and prejudicial nature of the misconduct which falls outside the protective scope of s. 111 of the LPA.

[37] Accordingly, this court finds that the statutory immunity conferred by s. 111 of the LPA is not available to the third defendant in the present case. The act of circulating the motion and tabling it for resolution at the AGM was not an act which can be properly described as one which was "done under the Act". On the contrary, it was an act done in breach of the Act. The third defendant is therefore not shielded from liability by s. 111 of the LPA.

Loss Of Reputation And Injury To Feelings

[38] The third defendant contends that damages for loss of reputation and injury to feelings are not recoverable under the tort of breach of statutory duty. It argues that such heads of loss are recoverable exclusively in actions for defamation. In support of this position, the third defendant relies on several legal authorities. Among them is the case of *Johnson v. Medical Defence Union Ltd* [2006] EWHC 321 (Ch), in which the court held that damages for general loss of reputation are only recoverable in defamation proceedings.

[39] In *Lonrho Plc v. Fayed (No 5)* [1993] 1 WLR 1489, the English Court of Appeal similarly held that, "if the plaintiffs want to claim damages for injury to reputation or injury to feelings, they must do so in an action for defamation, not in this very different form of action". This position reinforces the principle that reputational claims must be pursued through the specific tort of defamation and not by other means.

[40] This approach has been adopted by Malaysian courts. In *Kho Poh Teck v. Digi Telecommunications Sdn Bhd* [2006] 2 CLJ 957; [2006] 6 MLJ 349; [2006] 1 MLRH 387; [2006] 4 AMR 532, the High Court held that it would be contrary to public policy to conflate reputational claims under defamation with other tortious causes of action. The courts have thus consistently maintained a clear delineation between defamation and other torts in terms of recoverable heads of damage.

[41] These authorities must be evaluated within the context of the present case which involves a breach of a statutory duty concerning the regulation of legal practitioners. The statutory provision in question, namely s. 99(1) of the LPA, governs the commencement of disciplinary proceedings against advocates and solicitors. The Federal Court, at para. [50] of its judgment, underscores the significance of this provision, stating as follows:

> [50] Section 99(1) of the LPA must be construed strictly and narrowly as any step taken to commence disciplinary proceedings against an advocate and solicitor has the potential to ruin his reputation and livelihood ...

[42] This observation is of material significance. It reflects the Federal Court's recognition that s. 99(1) of the LPA serves, in part, to safeguard legal practitioners from unwarranted reputational harm. Where a statute is enacted for the protection of a particular class of persons and a breach of that statute causes the very harm it was intended to prevent, the injured party ought to be entitled to seek compensation under the tort of breach of statutory duty.

[43] The Federal Court's findings in this case provide further support for the recoverability of damages. At para. [68] of its judgment, the court found that the plaintiff had been "damnified" as a consequence of the breach. It noted that the allegation of misconduct by the appellant with all its intended defamatory meaning had been disseminated to no less than 15,000 members of the Bar, other than being disclosed to the media even before a complaint under s. 99(1) of the LPA was lodged with the Disciplinary Board.

[44] Having regard to the statutory purpose of s. 99(1) of the LPA and in light of the Federal Court's finding of actual prejudice suffered by the plaintiff, this court finds that damages for loss of reputation and injury to feelings are, in principle, recoverable under the tort of breach of statutory duty in this case.

[45] Nevertheless, the plaintiff bears the burden of proving that he has, in fact, suffered reputational loss. The third defendant contends that the plaintiff has failed to discharge this burden. It submits that the plaintiff continued to receive instructions in numerous high-profile cases following the circulation of the motion. The third defendant also points out that the plaintiff was appointed as Malaysia's Ambassador-at-Large for human rights from 2016 to 2018. His legal practice, it argues, appears to have remained professionally active and commercially viable.

[46] These submissions raise important considerations for assessing reputational harm within the legal profession. In evaluating reputational loss suffered by an advocate and solicitor, client diversity is a material indicator. A practice that continues to appear high-profile but becomes increasingly reliant on a limited client base may in fact signal reputational decline among the broader legal market.

[47] The timing of the plaintiff's engagement in the cited matters is also a significant factor. If the plaintiff was briefed in these matters prior to the dissemination of the motion, such engagements do not constitute reliable indicators of an unaffected reputation. Existing client relationships tend to be more resilient whereas reputational harm is more likely to manifest in lost or diminished opportunities for new engagements.

[48] The legal test for lost opportunity requires a counterfactual analysis. The court must consider what would likely have occurred but for the defendant's wrongful conduct. In *Masters Home Improvement Pty Ltd v. North East Solution Pty Ltd* [2017] 372 ALR 440, the Victorian Court of Appeal held that the court must consider whether opportunities were entirely lost. This principle is applicable when assessing lost professional or commercial opportunities arising from reputational harm.

[49] While the plaintiff bears the evidentiary burden, it is well established that losses such as reputational harm or diminished professional opportunity are inherently difficult to quantify with mathematical precision. In *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360; [1989] 2 MLRH 705, His Lordship the Honourable Edgar Joseph Jr J (as he then was) held that the difficulty in quantifying damages does not relieve the court of its obligation to award damages where loss has been proven.

[50] Having considered the evidence in totality, this court finds that the plaintiff's continued engagement in certain prominent matters when viewed alongside the issues of client concentration and engagement timing does not conclusively disprove the existence of reputational damage or lost opportunity. However, the plaintiffs evidence on specific harm suffered remains limited in scope.

[51] Taking into account the Federal Court's finding that the plaintiff was "damnified" by the dissemination of allegations to approximately 15,000 members of the Bar and to the media, this court finds that an award for reputational loss and injury to feelings is warranted. However, the quantum must be commensurate with the limited evidence of actual damage. The award must reflect a measured and proportionate response to the proven harm.

Loss Of Opportunity And Earnings

[52] The plaintiff alleges that as a consequence of the time and resources expended in addressing the present matter, he lost opportunities to act for other clients. He claims that this diversion of professional effort resulted in a loss of income. The third defendant, however, disputes this claim. It submits that the plaintiffs allegation amounts to a claim for pure economic loss which is generally not recoverable under the tort of breach of statutory duty. Further, the third defendant argues that the plaintiff has failed to adduce any specific or concrete evidence identifying particular opportunities that were lost as a direct result of the breach.

[53] The recoverability of economic loss under the tort of breach of statutory duty was addressed in the dissenting judgment of His Lordship the Honourable Zulkefli Makinuddin FCJ (later PCA) in the Federal Court decision of *Uda Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* [2009] 1 CLJ 329; [2009] 1 MLJ 737; [2008] 2 MLRA 554. In the same case, His Lordship the Right Honourable Zaki Azmi CJ concurred with the reasoning of His Lordship Justice Zulkefli Makinuddin. In that case, it was observed that in determining whether a claim for recovery of economic loss is recoverable from an alleged breach of statutory duty, it is important for the court to have regard to the overall scheme of the relevant statute. The court emphasised that it must first examine whether the statutory scheme in question was intended to protect economic interests.

[54] In the present case, the Federal Court, at para. [50] of its judgment, recognised the severe professional implications of improperly instituted disciplinary proceedings. It held that any such step has the potential to ruin the reputation and livelihood of an advocate and solicitor. This finding supports the view that s. 99(1) of the LPA is designed, at least in part, to protect both reputational and economic interests of legal practitioners.

[55] Accordingly, this court finds that, as a matter of principle, claims for economic loss are recoverable under the tort of breach of statutory duty where such loss flows from a breach of s. 99(1) of the LPA. Based on the observations made by the Federal Court, I hold the considered view that the statutory scheme of the LPA is intended to protect the livelihood of an advocate and solicitor and towards that end, a claim in damages for economic loss cannot be denied.

[56] Nevertheless, the plaintiff is still required to establish the factual basis of his claim for economic loss. This entails proving, firstly, the existence of a commercial or professional opportunity, and secondly, the loss of that opportunity.

[57] In *Masters Home Improvement Pty Ltd* (*supra*), the Victorian Court of Appeal clarified the applicable legal test. The court observed as follows:

> In considering damages for loss of a commercial opportunity, the court asks first whether there was a commercial opportunity of some value (which is more than speculative or negligible); that is, was there a chance? Secondly, the court looks to whether that opportunity has been lost; that is, would the plaintiff have pursued the opportunity.

[58] In the present case, the plaintiff has not furnished specific or corroborative evidence of any particular opportunities lost as a result of the breach. He has not provided any documentary proof, such as correspondence, briefing records or client withdrawal notices to support his allegation.

[59] Moreover, the plaintiff has failed to produce income tax returns or other financial documentation demonstrating a decline in earnings. He conceded during cross-examination that such records would constitute the best evidence of loss, yet no such evidence has been tendered.

[60] The plaintiff seeks to rely on s. 126 of the Evidence Act 1950 to justify his failure to produce financial records, asserting that the information is subject to legal privilege. Respectfully, I am unable to agree.

[61] In *Ketua Pengarah Hasil Dalam Negeri v. Bar Malaysia* [2022] 1 CLJ 81; [2022] 2 MLJ 428; [2022] 2 MLRA 110, the Court of Appeal held that privilege under s. 126 applies to financial information directly exchanged between an advocate and his client or maintained on the client's behalf. The court clarified that such privilege does not extend to the advocate's own income tax returns or personal financial statements. Accordingly, the plaintiff's tax filings, being his own financial documents and not part of his clients' confidential accounts, are not protected by s. 126 and could have been properly disclosed to support his claim.

[62] Nonetheless, some inference may reasonably be drawn from the narrowing composition of the plaintiff's client base following the circulation of the motion. The observable concentration of work from a smaller pool of clients suggests the possibility of diminished professional opportunities.

[63] While the evidence in support of lost opportunity is not strong, the totality of the circumstances, including the Federal Court's findings, permits a limited inference of economic loss. Therefore, this court finds that a modest award under this head of damage is warranted and proportionate to the available evidence.

Mental Stress And Health Problems

[64] The plaintiff contends that he suffered mental stress and adverse health effects as a direct consequence of the third defendant's breach of statutory duty. In response, the third defendant submits that this head of claim was not pleaded in the plaintiff's amended statement of claim. Furthermore, the third defendant argues that the plaintiff has failed to adduce any expert medical evidence to establish a causal link between his alleged health conditions and the breach of s. 99(1) of the LPA. As such, the claim is said to lack both procedural foundation and evidentiary support.

[65] The requirement to plead allegations of mental distress or injury is well-established. Order 18 r. 12(1)(b) of the Rules of Court 2012 mandates that matters involving the state of mind, such as emotional distress or psychological injury, must be expressly and specifically pleaded. A general or vague reference is insufficient. Failure to do so may render the claim procedurally defective. (See also: *Shen & Sons Sdn Bhd v. Jutawarna Development Sdn Bhd & Ors* [2015] 8 CLJ 125; [2016] 7 MLJ 183; [2016] 3 MLRH 479).

[66] The plaintiff has produced medical records indicating that he was admitted to the Institut Jantung Negara (IJN) in July 2016 and again in January 2017. While these records confirm hospitalisation, they do not establish the underlying cause of the plaintiff's medical condition.

[67] Moreover, both admissions occurred more than one year after the circulation of the motion on 9 March 2015. The plaintiff has not called any medical expert to testify that the breach of statutory duty was a proximate or contributing cause of the said health issues. No medical report, diagnosis or opinion has been produced linking the breach to the conditions treated during the admissions.

[68] The necessity of proving causation in claims arising from breach of statutory duty is well acknowledged. Mere proof of a breach of statutory duty is insufficient and that it is incumbent on a plaintiff to establish that that breach had given rise to the loss suffered by the plaintiff. In *Maybank Trustees Bhd v. Amtrustee Bhd & Ors And Other Appeals* [2019] CLJU 1454; [2019] 1 LNS 1454; [2020] 4 MLJ 405; [2019] MLRAU 310, Her Ladyship the Honourable Nallini Pathmanathan JCA (now FCJ) observed as follows:

> [696] (f) we are in agreement that in the context of the SCA (now the CMSA) the damages recoverable by the bondholders for the breaches of statutory duty ought not to be strictly confined to the rules developed for the assessment of damages solely in tort or contract. It may well be the case that in a given situation the loss awarded may be commensurate with the losses suffered by the application of rules utilised in tort or contract. But we concur that there ought to be no specific limitation imposed. The emphasis should be to enable the claimant to recover the losses suffered as a consequence of the statutory breach;

[69] Thus, the burden remains on the plaintiff to demonstrate a clear causal nexus between the breach and the alleged injury. A bare assertion of stress or illness unsupported by medical opinion or evidence does not meet the threshold of proof required.

[70] In the absence of expert medical evidence to establish causation, this court finds that the plaintiffs claim for damages in respect of mental stress and health-related issues has not been adequately substantiated.

[71] Nevertheless, the Federal Court's finding at para. [68] of its judgment that the plaintiff had been "damnified" as a result of the third defendant's conduct implies that some measure of distress was sustained. This includes emotional distress resulting from the premature and public circulation of serious allegations. Accordingly, this court finds that a modest award under this head is justified, not on the basis of physical health consequences but as recognition of the psychological impact flowing from the breach.

Aggravated Damages

[72] The plaintiff seeks an award of aggravated damages. He contends that the third defendant acted with malice and *mala fides* in circulating the motion entitled "Motion Against Shafee Abdullah". He further alleges that the actions of the third defendant were oppressive, arbitrary and demonstrated a disregard for his professional rights and standing.

[73] Aggravated damages are awarded in circumstances where the conduct of the defendant causes or exacerbates intangible injury to the plaintiff's dignity, reputation or emotional well-being. Such damages serve to compensate for the heightened harm resulting from conduct that is exceptional in character.

[74] In *Sambaga Valli K R Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] CLJU 500; [2017] 1 LNS 500; [2018] 1 MLJ 784; [2018] 3 MLRA 488; [2018] 4 AMR 745, the Court of Appeal affirmed that aggravated damages may be awarded where there is intangible harm to the plaintiffs personality or interests and where that harm has been caused or worsened by the defendant's exceptional conduct.

[75] The third defendant denies any malicious or improper intent in its actions. It contends that it did not knowingly contravene s. 99(1) of the LPA nor did it act with any ulterior or sinister motive. The third defendant's witness testified that it was the long-standing practice of the Bar to circulate all motions submitted under s. 64(6) of the LPA to members in advance of the AGM. This, the witness explained, was done to inform members of the matters scheduled for discussion at the AGM.

[76] The Federal Court, at para. [62] of its judgment, made a critical observation on the conduct of the third defendant. It remarked as follows:

> [62] Given the fact that the Malaysian Bar knew exactly what the correct procedure was in dealing with complaints of misconduct by its members, it does not speak well of its action in the present case in allowing the motion to be tabled and decided at the AGM instead of referring it to the disciplinary board for the Board's action ... .

[77] This observation highlights the fact that the third defendant acted contrary to its own knowledge of the proper statutory process. However, it falls short of establishing bad faith or malice.

[78] The Federal Court's statement does not constitute a positive finding of malice or *mala fides*. The Federal Court's comments were based, in part, on the views expressed by members of the Bar at the 67th AGM as recorded in the meeting minutes. The Federal Court did not make a formal finding that the third defendant acted with malicious intent or improper purpose.

[79] Moreover, both the High Court and the Court of Appeal had previously made concurrent findings that the motion was circulated on an occasion of qualified privilege and without malice. These findings were not disturbed by the Federal Court. As such, they remain binding. I hold the considered view that the existence of qualified privilege coupled with the absence of malice weighs very much against the award of aggravated damages.

[80] Nonetheless, the Federal Court's finding that the third defendant knew exactly what the correct procedure was indicates a serious degree of institutional carelessness. While this may not rise to the level of malice, it reflects a knowing disregard for procedural safeguards intended to protect the rights of advocates and solicitors.

[81] This court finds that such conduct warrants a limited award of aggravated damages. The award serves not as punishment but as compensation for the heightened injury caused by the third defendant's failure to adhere to known statutory obligations in a matter of professional discipline.

Exemplary Damages

[82] The plaintiff also seeks an award of exemplary damages. He contends that the third defendant's conduct in circulating the motion was oppressive, arbitrary and calculated to result in gain at his expense. He submits that such conduct justifies punitive sanction through an award of exemplary damages.

[83] Exemplary damages, unlike compensatory or aggravated damages, are awarded not to compensate the plaintiff but to punish the defendant and to deter similar future conduct. The foundational authority on the scope of

A exemplary damages remains *Rookes v. Barnard* [1964] AC 1129. In that case, Lord Devlin set out three categories of cases in which exemplary damages may be awarded, namely:

(i) oppressive, arbitrary, or unconstitutional acts committed by servants of the government;

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(ii) conduct by a defendant calculated to make a profit exceeding the damages payable to the plaintiff; and

(iii) cases in which exemplary damages are expressly authorised by statute.

C **[84]** This tripartite classification has been consistently endorsed by the Federal Court. Notably, it was affirmed in *Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals* [2021] 9 CLJ 179; [2021] 5 MLJ 937 FC; [2021] 6 MLRA 501 and in *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157; [2021] 3 MLJ 365; [2021] 3 MLRA 424. These

D authorities underscore the narrow and exceptional scope within which exemplary damages may be awarded.

[85] The plaintiff argues that the third defendant ought to be treated as a servant of the government for the purposes of the first category in *Rookes v. Barnard*. With respect, this contention is untenable. In *Malaysian Bar & Anor v. Government of Malaysia* [1987] 1 CLJ 459; [1987] CLJ (Rep) 185; [1987] 2 MLJ 165, His Lordship the Right Honourable Salleh Abas LP

E rejected any suggestion that the Malaysian Bar functions as an organ or instrument of the State. His Lordship emphasised that Parliament intended the governing bodies of the legal profession to operate independently and free

F from governmental control. Specifically, Parliament envisaged these bodies to be comprised of:

(i) individuals with substantial legal experience;

(ii) persons who are not members of the legislature; and

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(iii) individuals uninvolved in political or trade union activity.

[86] Further support for this interpretation is found in *Harmon CFEM Facades (UK) Ltd v. Corporate Officer Of The House of Commons* [1999] All ER (D) 1178. In that case, the court held that to qualify as a servant or agent of

H the government, a party must be exercising governmental functions or discharging duties on behalf of the state.

[87] The legislative intent precludes any classification of the third defendant as a governmental entity or servant of the state. The third defendant, in carrying out its functions under s. 64(6) of the LPA, does not

I act as a governmental authority or agent.

[88] Accordingly, this court finds that the third defendant is not a servant of the government. The act of circulating motions submitted by members under s. 64(6) of the LPA is not an exercise of governmental power. It is an internal procedural function undertaken within the governance framework of the legal profession.

[89] The plaintiff further contends that the third defendant's conduct falls within the second category identified in *Rookes v. Barnard* (*supra*), namely conduct calculated to generate profit at the plaintiffs expense. This court finds no merit in that contention. There is no evidence before the court to suggest that the third defendant sought to derive any financial or strategic benefit by disseminating the motion. No profit motive has been alleged with specificity nor has any such motive been proven.

[90] The high threshold required for the award of exemplary damages has also been emphasised by His Lordship the Honourable Gopal Sri Ram JCA (later FCJ) in *Khaw Cheng Poon & Ors v. Khaw Cheng Bok & Ors & Another Appeal* [2005] 3 CLJ 753; [2005] 6 MLJ 540; [2004] 2 MLRA 687; [2005] 5 AMR 185. His Lordship held that exemplary damages are only to be awarded in very special circumstances and that the plaintiff must produce clear evidence that the defendant has made or intended to make a profit from the wrongful conduct.

[91] Having reviewed the evidence in its entirety, this court finds that the plaintiff has failed to establish that the third defendant's conduct falls within any of the established categories set out in *Rookes v. Barnard* (*supra*). There is no basis upon which to award exemplary damages in the present case. Accordingly, no award is made under this head of claim.

Principles Of Moderation And Proportionality

[92] The assessment of damages must take into account the inherent difficulty in valuing reputational harm. In light of this challenge, the courts must rely on settled principles and precedent to ensure that awards remain reasonable. In assessing the quantum of damages, this court applies the principles of moderation and proportionality. These principles are fundamental in ensuring that damages serve their compensatory purpose without granting windfalls to plaintiffs or imposing excessive burdens on defendants.

[93] Our courts consistently exercise judicial restraint in awarding damages. This principle of moderation extends to all reputational harms including those resulting from breaches of statutory duty that affect an advocate's professional standing.

[94] Judicial decisions show that awards for reputational harm in Malaysia typically range between RM100,000 and RM400,000. In *Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors* [2018] CLJU 62; [2018] 1 LNS 62; [2018] 4 MLJ 209 CA; [2018] 6 MLRA 388, the Court of Appeal awarded RM200,000 in general damages. Similarly, in *Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 5 CLJ 301; [2010] 2 MLJ 492; [2009] 4 MLRH 48, the High Court awarded RM100,000 noting that the absence of evidence of economic harm limited the quantum.

[95] The principle of proportionality requires that any enhancement in damages be justified by exceptional circumstances. In *Nurul Izzah Anwar v. Tan Sri Khalid Abu Bakar & Anor* [2018] 7 CLJ 622; [2018] MLJU 472; [2018] MLRHU 1985, the High Court awarded higher damages of RM400,000 (against the first defendant) and RM600,000 (against the second defendant) respectively. These awards reflected the seriousness of the defamatory statements and the express malice with which they were made. This case illustrates that departures from the typical range must be grounded in clear aggravating factors.

[96] In *Sambaga Valli* (*supra*), the Court of Appeal reaffirmed that an award of exemplary damages is always tempered by principles of moderation and restraint. The court further held that quantum of aggravated damages must be proportionate and not arbitrary.

[97] The assessment of damages must strike a balance between adequate compensation and judicial restraint. In *Big Junkyard Sdn Bhd & Anor v. Chan Kah Wai* [2023] 1 CLJ 564; [2022] MLRHU 2416; [2022] AMEJ 1566, the court held that for aggravated damages, mere wrongful conduct is not sufficient. There must be something exceptional in the act that was done. This principle reinforces the requirement that enhanced damages must be grounded in clear and exceptional circumstances. Damages must remain proportionate to the actual harm suffered and to the severity of the defendant's conduct.

Conclusion

[98] Upon careful consideration of the totality of the evidence and the respective submissions of the parties, this court assesses the damages recoverable by the plaintiff under the following heads as follows:

(i) general damages:

(a) RM200,000 for reputational loss and injury to feelings;

(b) RM100,000 for loss of professional opportunity; and

(c) RM20,000 for mental stress and health-related consequences;

(ii) RM20,000 for aggravated damages; and

(iii) none allowed for exemplary damages.

[99] The total global sum awarded is RM340,000. This amount represents a fair, reasonable and proportionate assessment of the compensatory relief flowing from the third defendant's breach of statutory duty under s. 99(1) of the LPA.

Pursuant to the agreement reached by the parties at the commencement of trial, there shall be no order as to costs.